IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, *et al.*	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 4:05-cv-00329-GKF-PJC
	)	
TYSON FOODS, INC., *et al.*	)	
	)	
Defendants.	)	
	)	

REPLY IN SUPPORT OF DEFENDANTS' MOTION IN LIMINE TO EXCLUDE REFERENCE TO DEFENSE COUNSEL'S OPENING ARGUMENT TO THE COURT (DKT. NO. 2393)

Plaintiffs' *Response to Defendants' Motion in Limine to Exclude Reference to Defense Counsel's Opening Argument to the Court*, Dkt. No. 2488 (Aug. 20, 2009) ("Opposition"), makes clear the inappropriateness of allowing Plaintiffs to use Mr. Ryan's statement as "evidence" of the purported "over-application" of poultry litter in the IRW at trial. Plaintiffs seek to take a statement made in a specific context related to a point not even then at issue before the Court, and to construe it as a concession of the essential disputed fact for trial. Allowing Plaintiffs to do so would abuse the evidentiary process and be highly prejudicial to Defendants. The statement should therefore be excluded.

Defendants' Motion seeks to bar Plaintiffs from characterizing Mr. Ryan's statement as "an admission that poultry litter has been over-applied in violation of state or federal law." *Defendants' Motion in Limine to Exclude Reference to Defense Counsel's Opening Argument to the Court*, Dkt. No. 2393 at 1-2 (Aug. 5, 2009) ("Motion"). The context of Mr. Ryan's exchange with the Court makes clear that Mr. Ryan made no such an admission. *See* P.I.T. at 44:19-46:18, 47:20-48:5 (Feb. 19, 2008) (Ex. A). Rather, read in full, Mr. Ryan referred *only* to the application of litter in excess of minimum agronomic need for phosphorus as Plaintiffs had defined that term.[1] *See id.* Indeed, Plaintiffs themselves expressly acknowledge that Mr. Ryan's remarks apply to the "overapplication of poultry waste -- beyond agronomic need for phosphorus." Opp. at 2, 3. Plaintiffs nevertheless intend to embellish Mr. Ryan's statement by presenting it out-of-context as a general admission that poultry litter has been over-applied throughout the watershed in violation of the law. *See* Opp. at 4, 5, 7; *see also*, *e.g.*, P.I.T. at 14:2-4 (Mar. 12, 2008) (Mot. Ex. A); Dkt. No. 2062 at 18 ¶39. Indeed, Plaintiffs go so far as to request that the Court "bar Defendants from arguing at trial that there has not been an overapplication of poultry waste on some or many farms within the IRW." Opp. at 7. This would be inappropriate.

As this Court is well-aware, one of the central disputed issues in this litigation is whether poultry litter has been over-applied in violation of federal or state law. *See*, *e.g.*, Dkt. No. 2199 at 18-19 ¶39 (disputing alleged "undisputed fact" that "poultry waste has been over applied in the IRW"). Any attempt to mislead the trier of fact by referencing Mr. Ryan's remarks as a judicial or evidentiary admission on this point is therefore likely to result in extreme and unfair prejudice to Defendants, as well as unnecessary confusion and undue delay. Mr. Ryan's statement is therefore of little probative value as Defendants have not disputed that poultry litter has been applied in the IRW to fields with phosphorous readings above 65 STP, in accordance with the rates and instructions set forth in state-issued and approved animal waste management plans ("AWMPs"). *See*, *e.g.*, Dkt. No. 1925 at 8; Dkt. No. 2183 at 17-19 ¶¶37-39. Because "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the

[1] Plaintiffs' expert, Dr. Gordon Johnson, has defined the minimum agronomic need for phosphorus as the value of soil test phosphorus at 65 lb P/acre ("65 STP"). *See* Report of Gordon V. Johnson, at 4-5 ¶5(b) (Ex. B). For purposes of this Motion, the phrases "agronomic need for phosphorus" and "65 STP" may be used interchangeably.

issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence" any reference to Mr. Ryan's statements should be properly excluded under Federal Rule of Evidence 403.

Mr. Ryan's statements cannot be admitted as a judicial or evidentiary admission that poultry litter has been applied in violation of the law. Further, in light of the unfair prejudice, confusion and delay that are likely to result from Plaintiffs' intended use of Mr. Ryan's statement at trial, the Court should exercise its discretion to exclude any reference to the remarks under Rule 403. Alternatively, in the event that Mr. Ryan's statement is deemed admissible, Defendants request that, at a minimum, the Court require its presentation in context.

I. Mr. Ryan's Statement Does Not Constitute a Judicial or Evidentiary Admission that Poultry Litter Has Been Over-Applied In Violation of the Law

Mr. Ryan's statement cannot constitute a judicial admission or evidentiary exception to the hearsay rule that poultry litter has been over-applied in violation of state or federal law. As detailed in Defendants' Motion and corroborated by Plaintiffs in their Opposition, Mr. Ryan's statement related solely to the application of poultry litter relative to Plaintiffs' asserted 65-STP threshold, a practice that is expressly approved in field-specific AWMPs promulgated pursuant to Oklahoma and Arkansas law. *See* Mot. at 1-3; Opp. at 3, 5; *infra* at 4-5. No rule of evidence authorizes Plaintiffs to read Mr. Ryan's statement into evidence as a judicial admission of anything else, particularly not as a judicial or evidentiary admission that poultry litter has been over-applied in the IRW in violation of the law.

Plaintiffs continue to overstate Mr. Ryan's observation. As the Court knows, the preliminary injunction hearing concerned Plaintiffs' claims regarding bacteria under RCRA, not the phosphorous case they will present at trial. Nevertheless, during his opening statement, Mr. Edmondson specifically alleged that poultry "litter is being applied well *in excess of the* *agronomic needs* of crops." P.I.T. at 31:14-17 (Feb. 19, 2008) (Ex. C). Plaintiffs, he promised, would present expert testimony "about *agronomic rates and the effects of overapplication*." *Id.* at 37:15-16. He concluded by asserting that poultry litter "is simply dumped on the land ostensibly as fertilizer, but far in excess of the agronomic needs of the plants." *Id.* at 41:5-7. Hence, when Mr. Ryan began his opening statement, the Court asked him specifically to address Plaintiffs' contention that poultry litter "may not be waste to the extent that the fertilizer can be taken up by the ground and the plants to which it's applied, and that it may under the law be waste to the extent it's overapplied." *Id.* at 44:22-25. Thus, the context of Mr. Ryan's exchange with the Court was not the over-application of litter generally or in violation of any particular law, but rather the application of poultry litter in excess of minimum agronomic needs. *See id.* at 43:15-46:18, 47:20-48:5.

In response to the Court's question, Mr. Ryan explained that Plaintiffs' claim of "overapplication" went only to poultry litter's phosphorous content, not the many other valuable nutrients that poultry litter contains. *Id.* at 45:19-46:18. "I don't think there's any question but that there has been an overapplication of litter on some or many farms. That's not an issue in our book. *I'm certainly not arguing that in terms of phosphorus*." *Id.* at 46:15-18 (emphasis added). This statement, which Plaintiffs read as a generally concession of liability, went only to the uncontested fact that farmers apply poultry litter consistent with their animal waste management plans, even when those plans approve the application of litter to fields already measuring in excess of 65 STP—*i.e.* in the Court's words, "the extent that the fertilizer can be taken up by … the plants to which it's applied." *Id.* at 44:22-25. Mr. Ryan acknowledged no more and no less.

In closing arguments, Mr. George reiterated this point: "What Mr. Ryan said during opening was that to the extent applying phosphorus above the agronomic rate of phosphorus is over-application, that has occurred in this watershed … [because] [t]he plans issued by the State of Oklahoma permit that to occur." P.I.T. at 32:23-33:13 (Mar. 12, 2008) (Mot. Ex. A). Consistent with this explanation, Plaintiffs Opposition acknowledges that Mr. Ryan's statement applies only to the "overapplication of poultry waste -- beyond agronomic need for phosphorus." Opp. at 2, 3. Mr. George's explanation is entirely consistent with the context in which Mr. Ryan made his statement in the course of his discussion with the Court regarding *Plaintiffs'* contention that litter has been applied in excess of the agronomic rate for phosphorous.

As detailed in Defendants' Motion, Mr. Ryan's statement cannot constitute evidence that a trier of fact may consider. *See* Mot. at 3-4; *see*, *e.g.*, *United States v. Broomfield*, 201 F.3d 1270, 1277 (10th Cir. 2000) ("the statements and arguments of counsel are not to be considered evidence in the case"). Moreover, understood in context, Mr. Ryan's statement simply cannot constitute a deliberate, judicial admission that poultry litter has been over-applied in violation of the law. *See* Mot. at 3-5.[2] *First*, Mr. Ryan's statement did not "formally and deliberately" concede any issue in dispute, but rather was consistent with Defendants' understanding that application at rates in excess of agronomic need for phosphorus is authorized by Oklahoma law. *See* Mot. at 3-5; *Oscanyan v. Arms Co.*, 103 U.S. 261, 263 (1880) (holding that a statement does not concede a point "if a doubt exists" as to its meaning); *Mitchell v. Lone Star Ammunition, Inc.*, 913 F.2d 242, 252 (5th Cir. 1990) ("Oral argument . . . does not come within the category of deliberate admissions . . . .") (internal citation omitted). *Second*, even if ambiguous standing-alone, Mr. George's subsequent clarification of the statement removes any doubt on this point.

[2] In this respect Plaintiffs' analysis misinterprets the scope of Defendants' Motion. In arguing that Mr. Ryan's statement constitutes a formal "judicial admission" and/or "evidentiary admission under Fed. R. Evid. 801(d)(2)" that poultry litter is over-applied in excess of minimum agronomic need, Plaintiffs neglect to recognize that the present Motion seeks a ruling only that Mr. Ryan's statement does not constitute a judicial or evidentiary "admission that poultry litter has been over-applied in violation of state or federal law." *Compare* Mot. at 1, *with* Opp. at 3-8. The exclusion of Mr. Ryan's statement, in its entirety, is separately requested with reference to Rule 403.

See Oscanyan, 103 U.S. at 263 (holding that a statement does not concede a point "if a doubt exists" as to its meaning); *Smith v. Argent Mortgage Co.*, 2009 WL 1391550 at *5 (10th Cir. May 18, 2009) ("Where, however, the party making an ostensible judicial admission explains the error in a subsequent pleading or by amendment, the trial court must accord the explanation due weight." (quoting *Sicor Ltd. v. Cetus Corp.*, 51 F.3d 848, 859-60 (9th Cir. 1995)). Finally, the hearsay exception under Federal Rule of Evidence 801(d)(2) does not give Plaintiffs license to misconstrue Mr. Ryan's statement as an evidentiary admission that poultry litter is over-applied in violation of the law generally.

For these reasons, and those set forth in Defendants' Motion, Mr. Ryan's statement cannot constitute admissible evidence that poultry litter has been over-applied in the IRW in violation of federal and state law.

II. The Probative Value from Any Reference to Mr. Ryan's Statement is Substantially Outweighed by the Danger of Unfair Prejudice, Confusion and Undue Delay

Although Plaintiffs acknowledge that Mr. Ryan's remarks apply only to the "overapplication of poultry waste -- beyond agronomic need for phosphorus," Opp. at 2, 3,[3] Plaintiffs' Opposition demonstrates their intention to mischaracterize the statement at trial as a broad admission that over-application has occurred in violation of the law. For example, each of the following passages from Plaintiffs' Opposition distorts Mr. Ryan's statement by excluding any reference to the minimum agronomic need for phosphorus:

- "Mr. Ryan's statement concerning the overapplication of poultry waste in the IRW is a judicial admission and binding against Defendants." Opp. at 4.

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[3] *See* Opp. at 2 ("Reviewing this exchange in context, it is clear that Mr. Ryan unambiguously admitted that poultry litter has been over-applied to the land *in excess of agronomic need (for phosphorus)* on some or many farms.") (internal quotations omitted) (emphasis added); *id.* at 3 ("Mr. Ryan's statement must be viewed as a judicial admission by Defendants that there has been overapplication of poultry waste -- *beyond agronomic need for phosphorus* -- on some or many farms within the IRW.") (emphasis added).

- "Therefore, the State should be permitted to present Mr. Ryan's statement to the fact-finder as a binding judicial admission, and Defendants should be barred from arguing that there has not been an overapplication of poultry waste on some or many farms within the IRW. This judicial admission should be accepted free of Mr. George's strained 'nutrient management plan' explanation." Opp. at 5.
- "In sum, Mr. Ryan's statement is relevant and should be deemed a binding judicial admission; the Court should bar Defendants from arguing at trial that there has not been an overapplication of poultry waste on some or many farms within the IRW." Opp. at 7.

Plaintiffs have repeatedly represented this statement as evidence of illegal overapplication of poultry litter. *See*, *e.g.*, P.I.T. at 14:2-4 (Mar. 12, 2008) (arguing in closing that "we also have the admission by the defendants in their opening that there has been an over-application of poultry waste with respect to phosphorous") (Mot. Ex. A); Dkt. No. 2062 at 18 ¶39 (asserting as an undisputed fact that "[p]oultry waste has been over applied in the IRW" (citing *inter alia* Dkt. No. 2062 Ex. 61 (Ryan P.I. Opening. at 46))). To avoid the unfair prejudice, confusion and undue delay that will undoubtedly result from Plaintiffs' intended use of Mr. Ryan's statement at trial, the Court should exercise its discretion to exclude any reference to this statement under Rule 403—even if for the inauspicious purpose of showing that poultry litter is sometimes applied to fields already measuring 65-STP, as approved by State-issued AWMPs.

Mr. Ryan's actual statement is of little probative value. Indeed, the point is not disputed because AWMPs issued pursuant to both Oklahoma and Arkansas law expressly authorize the application of poultry litter in excess of 65 STP. *See supra* at 4-5. Plaintiffs have no proof that poultry litter is applied in the IRW in violation of state-drafted and approved AWMPs, each of which expressly permits application of poultry litter at field-specific rates in excess of 65 STP. *See id.*; *see*, *e.g.*, Dkt. No. 2033 Exs. 10-17 (AWMPs). Ample evidence therefore exists for Plaintiffs to assert that poultry litter is applied in excess of 65 STP. As a result, any reference to Mr. Ryan's statement as evidence that poultry litter is over-applied in excess of 65 STP is unnecessary, cumulative and of little, if any, probative value.[4]

In contrast, Defendants are clearly prejudiced by Plaintiffs' repeated out-of-context references to Mr. Ryan's remarks, which seek to distort the statement as an admission that farmers have over-applied poultry litter in violation of the law. *See United States v. Caraway*, 534 F.3d 1290, 1301 (10th Cir. 2008) ("To be unfairly prejudicial, the evidence must have 'an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.'" (quoting Fed. R. Evid. 403 advisory committee's note)). To address these misrepresentations, Defendants will be required to present evidence clarifying the true meaning of Mr. Ryan's statement—devolving the entire matter into a mini-trial on this issue. Such a result would confuse the issues actually in dispute, uselessly delay the trial, and should be avoided in accordance with Rule 403. *See*, *e.g.*, *Unit Drilling Co. v. Enron Oil & Gas Co.*, 108 F.3d 1186, 1194 (10th Cir. 1997) (affirming exclusion of evidence of "limited" probative value that "could have lead to a side trial that would distract the jury from the main issues in the case"); *United States v. Talamante*, 981 F.2d 1153, 1156 & n.5 (10th Cir. 1992) (supporting exclusion of evidence that would "lead to collateral mini trials").[5]

The question of relevance and the task of balancing the probative value of evidence against the dangers of unfair prejudice, confusion, undue delay and other considerations are wholly within the discretion of the trial court. *See Averitt v. Southland Motor Inn*, 720 F.2d 1178, 1181 (10th Cir. 1983); *Rigby v. Beech Aircraft Co.,* 548 F.2d 288, 293 (10th Cir. 1977)

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[4] Additionally, any probative value that might exist would be lost by virtue of Plaintiffs' intended reference to the statement in vague and ambiguous terms. *See*, *e.g.*, *Liv. Canarozzi*, 142 F.3d 83, 87 (2d Cir. 1998) (affirming exclusion of statements that were "too vague to be probative").

[5] In casually dismissing Defendants' Rule 403 argument, Plaintiffs merely state that these concerns are "imagined 'dangers' of prejudice, confusion and delay," without any explanation. Opp. at 8. As detailed herein, the unfair prejudice, confusion and undue delay that would result from Plaintiffs' intended references to Mr. Ryan's statement are not at all imagined, but are in fact very real.

("The task of balancing the probative value of evidence against danger of confusion of the issues is one for which the trial judge, because of his familiarity with the full array of evidence in the case, is particularly suited."). Here, Defendants respectfully move the Court to exercise its discretion to preclude any reference to Mr. Ryan's statement. Plaintiffs have repeatedly demonstrated their intent to distort Mr. Ryan's statement by quoting it out-of-context and mischaracterizing it as an admission that poultry litter has been applied in violation of the law. Given the limited probative value (if any) of this intended use at trial, Mr. Ryan's remarks should be excluded under Rule 403 to avoid the substantial danger of unfair prejudice, confusion and undue delay that will undoubtedly result.

III. If Admitted, the Court Should Require Plaintiffs To Refer to Mr. Ryan's Statement in Proper Context to Avoid Any Unfair Prejudice, Confusion and Undue Delay

In the event that the Court does allow Plaintiffs to reference Mr. Ryan's statement, Defendants respectfully request that Plaintiffs be required to present the statement in context as an admission *only* as to the application of poultry litter to fields measuring more than 65 STP. For instance, Plaintiffs should be barred from characterizing Mr. Ryan's statement as either (1) an admission that poultry litter has been over-applied in violation of state or federal law; or (2) a general admission that over-application of poultry litter has occurred in the IRW. Absent the requested order, Plaintiffs' misleading references to Mr. Ryan's statements will likely result in unfair prejudice, confusion and undue delay. *See supra* at 7-10. Accordingly, if the evidence is to be admitted, this Court should exercise its discretion to fashion an order requiring that any reference to the statement be expressly limited to apply only as to the application of poultry litter in excess of minimum agronomic need for phosphorus.

CONCLUSION

For the foregoing reasons, the Court should exercise its discretion to exclude any reference to defense counsel's statement.

Respectfully submitted,

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